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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

CENTRAL DISTRICT

WILLIAM S. NYE a/k/a BILL NYE, an individual; JAMES MCKENNA, an individual; ERREN GOTTLIEB, an individual; ABLESOFT, INC., a Pennsylvania corporation f/k/a RABBIT EARS PRODUCTIONS, INC.; CASCADE PUBLIC MEDIA d/b/a KCTS-TV, a Washington public benefit corporation,

Plaintiffs,

v.

THE WALT DISNEY COMPANY, a Delaware corporation; BUENA VISTA TELEVISION, LLC, a California limited liability company f/k/a BUENA VISTA TELEVISIONS, INC.,

Defendants.

CASE NO. BC 673 736

DEFENDANTS' NOTICE OF MOTION AND MOTION FOR SUMMARY ADJUDICATION RE BREACH OF FIDUCIARY DUTY AND FRAUD CAUSES OF ACTION, PUNITIVE DAMAGES CLAIM, AND ABLESOFT STANDING

[Separate Statement of Undisputed Material Facts, Evidence In Support, and [Proposed] Order Filed Concurrently Herewith]

Date: August 7, 2019
Time: 8:30 a.m.
Location: Dept. 20
Judge: Hon. Dalila Corral Lyons

File Date: August 24, 2017
Trial Date September 16, 2019

RESERVATION ID: 490533770616

TO THE HONORABLE COURT, ALL PARTIES AND THEIR COUNSEL OF RECORD HEREIN:

PLEASE TAKE NOTICE that, on August 7, 2019, at 8:30 a.m., in Department 20 of the above-captioned Court, located at 111 North Hill Street, Los Angeles, CA 90012, the Honorable Dalila Corral Lyons presiding, Defendants The Walt Disney Company ("TWDC") and Buena Vista Television, LLC ("BVT") (collectively "Defendants") will and hereby does move the Court, pursuant to Code of Civil Procedure Section 437c(f)(1), for an order granting summary adjudication in favor of BVT and against Plaintiffs William S. Nye ("Nye"), James McKenna ("McKenna"), Erren Gottlieb ("Gottlieb"), Ablesoft, Inc. ("Ablesoft"), and Cascade Public Media d/b/a KCTS-TV ("KCTS") (collectively, "Plaintiffs") as set forth below.

ISSUE ONE: Plaintiffs' Fifth Cause of Action for Breach of Fiduciary Duty should be summarily adjudicated in BVT's favor because, as a matter of law, Plaintiffs cannot establish that BVT owed any fiduciary duties or obligations to Plaintiffs.

ISSUE TWO: Nye's Third Cause of Action for Fraudulent Inducement/False Promise should be summarily adjudicated in favor of TWDC and BVT because Nye has no evidence that TWDC or BVT knowingly made any false representations on which Nye relied to his detriment in deciding to audit.

ISSUE THREE: Plaintiffs' First Cause of Action for Fraudulent Concealment should be summarily adjudicated in BVT's favor because Plaintiffs have no evidence that BVT knowingly concealed information on the participation statements rendered to Plaintiffs to misrepresent whether Plaintiffs were owed net profits from *Bill Nye The Science Guy* ("the Series).

ISSUE FOUR: Plaintiffs' Second Cause of Action for Fraudulent Misrepresentation should be summarily adjudicated in BVT's favor because Plaintiffs have no evidence that BVT knowingly misrepresented facts on the participation statements rendered to Plaintiffs to misrepresent whether Plaintiffs were owed net profits from the Series.

ISSUE FIVE: Plaintiffs' claim for punitive damages on the First, Second, and Third Causes of Action for Concealment, Fraudulent Misrepresentation, and Fraudulent

Inducement/False Promise should be summarily adjudicated in TWDC and BVT's favor because Plaintiffs have no evidence that an officer, director, or managing agent of TWDC or BVT knew that an employee that committed the acts on which the punitive damages claim is based was unfit, and employed him or her with a conscious disregard of Plaintiffs' rights, or authorized or ratified any purported wrongful conduct on which Plaintiffs' fraud claims are based.

ISSUE SIX: All claims asserted by Ablesoft in this action should be summarily adjudicated BVT's favor because Ablesoft lacks standing to sue.

This Motion for Summary Adjudication is based on this Notice of Motion; the accompanying Memorandum of Points and Authorities; the concurrently-filed declaration of Christopher A. Elliott and exhibits thereto filed in support of Defendants' Motion for Summary Adjudication; the concurrently-filed Separate Statement of Undisputed Material Facts; and, Request for Judicial Notice. This Motion also is based on all pleadings and papers filed in this action at or before the hearing on this Motion, any Reply that may be filed by Defendants, all other matters of which the Court may or must take judicial notice, and all other argument and evidence presented to the Court at or before the hearing on this Motion.

DATED: May 24, 2019

Respectfully submitted,

MITCHELL SILBERBERG & KNUPP LLP
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs'[1] complaint alleging that Defendant Buena Vista Television, LLC ("BVT") underpaid Net Profits[2] from the television show "Bill Nye the Science Guy" (the "Series") is a breach of contract action. They tried to make it into a broader tort action by alleging breach of fiduciary duty and three varieties of fraud, but with discovery now nearly complete, the undisputed facts establish that BVT was not a fiduciary of Plaintiffs and there are no facts to support fraud or punitive damages.

Plaintiffs' claims arise from a March 1993 agreement regarding production and distribution of the Series (the "Agreement"). Plaintiffs' breach of fiduciary duty claim would require that the parties' relationship constitutes a joint venture, but there is an express disclaimer in the Agreement; the parties' relationship is *not* a joint venture. Plaintiffs contend the provision is unconscionable, but they are unable to establish facts that support either procedural or substantive unconscionability, both of which are required to void the disclaimer. Moreover, even if there were no disclaimer, the relationship still would not give rise to a joint venture because there was no common interest in a joint enterprise, no right to joint control, and no sharing of risks and losses.

Two of Plaintiffs' three fraud causes of action are based on financial participation statements (the "Statements"). Plaintiffs allege BVT fraudulently misrepresented or concealed financial information in the Statements, but they have not identified any specific misrepresentations or concealed facts, and there is no evidence of any or that BVT intended to defraud them.

The third fraud claim (by Nye only) is for fraudulent inducement and is the only cause of action alleged against The Walt Disney Company ("TWDC"). Nye claims he was fraudulently induced by BVT and TWDC to audit because his representatives purportedly were told that if he

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[1] William Nye ("Nye") was the first Plaintiff to sue in August 2017. Plaintiffs Cascade Public Media d/b/a KCTS-TV ("KCTS"), James McKenna ("McKenna"), Erren Gottlieb ("Gottlieb") and Ablesoft Inc., f/k/a Rabbit Ears Productions, Inc. ("Ablesoft") (collectively "Other Plaintiffs") joined the lawsuit in April 2018.

[2] All capitalized terms not expressly defined herein have the meanings set forth in the Agreement.

audited, any request he made for documents would be granted. The undisputed facts, however, completely contradict his allegations. Nye admitted at deposition that he is not aware of any statements made by anyone at Disney telling him that he should audit and any and all documents he requested would be made available. After more than a year of discovery, he is not aware of any representations that were made regarding the audit, any facts to support fraudulent intent, or any evidence of justifiable reliance.

Plaintiffs also seek punitive damages on their fraud claims. Punitive damages are appropriate only if Plaintiffs can establish by clear and convincing evidence that Defendants acted with oppression, fraud or malice. Plaintiffs cannot establish a valid fraud claim, and there is no evidence that Defendants acted with malice or oppression. They have not identified a single officer, director, or managing agent of Defendants that committed, authorized, or ratified any allegedly fraudulent act, which is essential in order to recover punitive damages against a corporation.

Finally, and almost incidentally, plaintiff Ablesoft alleges it is the successor to Rabbit Ears, a party to the Agreement, but has produced no evidence to show that it succeeded to or acquired Rabbit Ears' rights and its corporate designee admitted at deposition it has no such evidence. Therefore, it has no standing to be a party to this lawsuit.

II. SUMMARY OF RELEVANT FACTS

A. Negotiation of the Agreement

Nye, McKenna, and Gottlieb initially developed the idea for a "Bill Nye" science show in the late 1980's. (UMF 1.) They began working with KCTS, the Seattle affiliate of PBS, and Rabbit Ears Production, Inc. ("Rabbit Ears"),[3] to develop a pilot, which aired in 1992. (UMF 2.)

In March 1993, BVT became aware of the pilot and expressed interest in producing the Series to Nye's agent, Paul Frank, at the William Morris Agency. (UMF 3.) Over the next several weeks between the end of March and April 16, 1993, the parties negotiated a written agreement. (UMF 4.) All parties were represented by counsel: Nye by Andrew Salter of Miller Nash,

[3] Ablesoft alleges it is the successor to Rabbit Ears' interest under the Agreement. For the purposes of this Motion only, BVT assumes the truth of that allegation.

McKenna and Gottlieb by Marshall Nelson of Davis Wright and Tremaine, KCTS either by in-house counsel or an attorney at Bogle & Gates, Rabbit Ears by Peter Nelson of Nelson, Guggenheim & Felker, and BVT by Werner. (UMF 5-9.) Frank also participated. (UMF 10.)

The Agreement was heavily negotiated. Multiple drafts were exchanged. (UMF 11.) As a result of the negotiations, numerous changes were made in each parties' favor, but primarily benefitted Plaintiffs:

- The per-episode fee to be paid to Plaintiffs for their services was increased from $11,000 to $12,500. (UMF 13.)
- Plaintiffs were reimbursed their development costs. (*Id.*)
- Nye was permitted to use the Science Guy character in connection with a separate book deal. (*Id.*)
- The distribution fees that BVT was entitled to apply in calculating Net Profits were reduced, and the distribution fee for the video market was eliminated. (*Id.*)
- A $50,000 per year royalty was added to be paid to Nye if his likeness was used at a theme park. (*Id.*)
- The rights to the Science Guy character reverted to Nye after the Series ended its run. (*Id.*)
- Plaintiffs were accorded the right to audit BVT's books and records. (*Id.*)

Each Plaintiff reviewed the drafts of the Agreement with their counsel, and read it before signing. (UMF 15-16.) Executed copies were circulated on April 16, 1993. (UMF 17.)

B. <u>Key Provisions of the Agreement</u>

BVT agreed to fund the costs of production for the Series capped at $115,000 per episode, to pay Plaintiffs a production fee, to pay an additional directing fee to McKenna and Gottlieb if they directed any episodes, to reimburse certain development costs, to license the Series to KCTS free of charge for broadcast in the Seattle market, and to pay Plaintiffs 50% of Net Profits. (UMF 18-21.)

Paragraph 10 of the Agreement explains how Net Profits are calculated: certain specified receipts are included in Gross Receipts; certain specified fees, expenses, and other costs are deducted from Gross Receipts; and the amount remaining after the deductions are Net Profits. (UMF 22.) The parties agreed BVT would issue Statements to Plaintiffs "accompanied by payments due, if any, 90 days after the close of each accounting period." (UMF 23.)

BVT was accorded exclusive distribution rights:

> BVT shall have exclusive rights throughout the world, in perpetuity, subject to Paragraph 16, to the Property (including but not limited to all concepts, ideas, elements, or other constituent elements of the Property) and to distribute and exploit all programs and adaptions of the Property (including but not limited to, the Series and the Pilot), by any means whether now known or hereinafter invented, including, but not limited to television, video cassette, video disc, publishing, merchandising, licensing and any and all other subsidiary rights of any kind whether now known or hereinafter invented.

(UMF 24.) In addition, BVT maintained production creative approvals over the Series as set forth in paragraph 5 of the Agreement as to all principal creative elements. (UMF 26.)

On the signature page, the parties expressly agreed: "Nothing herein contained shall constitute a partnership between, or joint venture of, the parties hereto or constitute either party the agent of the other" (the "Disclaimer"). (UMF 30.)[4]

The Series began airing in 1993. It was subsequently renewed several times. (UMF 36.) The parties amended the Agreement four times in connection with renewals, and reduced BVT's obligation to fund production costs in subsequent seasons. (UMF 37.) In all the amendments, the parties never changed the Disclaimer. (*Id.*)

C. <u>Statements Are Issued to Plaintiffs</u>

Beginning on July 7, 1994, and every quarter thereafter until June 30, 1998, Statements were delivered to Plaintiffs in care of the William Morris Agency showing the accounting of Net

[4] Similar language was included in the Standard Terms and Conditions attached to the Agreement that also were negotiated by the parties. (UMF 31.)

Profits. (UMF 40.) During that period, no Net Profits were earned.[5] (*Id.*) On June 30, 1998, BVT's participations department sent a letter to Plaintiffs accompanying the Statement, telling them it did not intend to send any further Statements because BVT did not forecast the Series would reach Net Profits. (UMF 42.) The participations department invited Plaintiffs to contact it if they wanted further information. (*Id.*) Except for KCTS, none of the Plaintiffs requested further Statements. (UMF 43.)

At KCTS' request, BVT provided additional Statements in 2000 and 2004. (UMF 44.) At the time the 2004 Statement was sent to KCTS, the Series still had not begun earning Net Profits. (UMF 45.) However, beginning with the 2005 Statement, the Series reached Net Profits after all and BVT began issuing annual Statements and paying Net Profits to Plaintiffs. (UMF 46-47.)

D. <u>The 2008 Overpayment</u>

Net Profits were paid to Plaintiffs in 2005, 2006, 2007, and 2008. (UMF 47.) After issuing a Statement and paying Plaintiffs in 2008, BVT discovered the amount of video receipts included in Gross Receipts had been miscalculated too high, and that Plaintiffs had thus been overpaid.[6] (UMF 48.) On July 22, 2008, the participations department wrote to Plaintiffs explaining the error, provided a corrected summary of the Statement, and requested that Plaintiffs repay the overpaid amounts. (*Id.*) On September 11, 2008, the participations department sent a more detailed schedule further explaining the overpayment and a complete revised statement. (UMF 49.)

A year later, Salter sent a letter dated October 5, 2009 to Alan Braverman, TWDC's General Counsel, which he objected to the recoupment, and requested Braverman's assistance to resolve "certain matters in dispute . . . concerning compensation." (UMF 50.) Salter contended BVT was "in breach of its obligations under the 1993 contract," and that BVT had not "properly compensated" Nye "since the inception of the 1993 agreement." (*Id.*) On November 4, 2009, Braverman responded, disagreeing with Salter's position and noting Nye's right to audit the

[5] The Statements were sent by the participations department, a shared service group that handles the participations accounting and reporting on behalf of BVT and its affiliates.

[6] The error occurred when Disney Educational Productions, an affiliate of BVT that distributed videos of the Series to schools and libraries, incorrectly recorded 100% of revenues to Gross Receipts, rather than 20%, as called for under paragraph 10.5.A(ii) of the Agreement. (UMF 48.)

Statements. (UMF 51.) Braverman told Salter that, if there were a practical way short of an audit to provide further accounting information, BVT was willing to do so. (*Id.*) On February 3, 2010 Salter wrote to Braverman again, reiterating that Nye had claims for breach of contract, detrimental reliance, and negligent misrepresentation, and challenging deductions BVT had applied in calculating Net Profits. (UMF 52.) On March 30, 2010, Braverman responded, again disagreeing with Salter's charges and again noting Nye's right to audit. (UMF 53.)

E. Nye's Belated Audit

Nearly four years passed before Nye took any further action. On January 8, 2014, Nye requested an audit of BVT's books and records. (UMF 54.) In response to his audit request, BVT agreed to toll a 24-month incontestability provision in the Agreement and any statutes of limitations until the audit began. (UMF 55.) When the audit commenced on May 2, 2016, tolling stopped. (*Id.*) However, at Nye's request, BVT agreed to restart tolling which continued by agreement through August 23, 2017, when Nye filed this lawsuit. (*Id.*) The Other Plaintiffs joined the lawsuit in the Second Amended Complaint filed on April 2, 2018. (UMF 63.) None of the Other Plaintiffs ever conducted an audit of BVT or requested any tolling. (UMF 64.)

III. ARGUMENT

To meet the burden of proof on summary adjudication, a defendant must produce evidence that negates an essential element of the plaintiff's case, establishes a complete defense to the plaintiff's claims, or demonstrates an absence of evidence to support the plaintiff's case. *See Angelica Textile Services, Inc. v. Park*, 220 Cal. App. 4th 495, 504 (2013). Absence of evidence may be shown through: (1) admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing; or (2) discovery responses that are factually devoid. *Chavez v. Glock, Inc.*, 207 Cal. App. 4th 1283, 1302 (2012); *see also Silva v. See's Candy Shops, Inc.*, 7 Cal. App. 5th 235, 259-260 (2016) (absence of evidence established where plaintiff provided factually devoid responses to interrogatories asking that she "state with particularity" all facts supporting her claim); *Collin v. CalPortland Company*, 228 Cal. App. 4th 582, 590-591 (2014) (lack of

causation inference raised where plaintiff's responses to interrogatories failed to state facts showing plaintiff was exposed to asbestos as a result of defendant's activities).

Once the moving party's burden is met, the burden shifts to the plaintiff to demonstrate with "substantial" responsive evidence, the existence of a triable issue of material fact. *Granadino v. Wells Fargo Bank, N.A.*, 236 Cal. App. 4th 411 (2015). Interrogatory answers that contain no facts are insufficient to shift the burden of proof to the plaintiff. *See Union Bank v. Sup. Ct.*, 31 Cal. App. 4th 573, 581 (1995) (burden shifted; plaintiff's factually devoid discovery responses did not identify specific misrepresentations by defendant); *Certain Underwriters at Lloyd's of London v. Sup. Ct.*, 56 Cal. App. 4th 952, 959 (1997) (plaintiff's "factually vague discovery responses" are insufficient to meet defendant's burden to show plaintiff's inability to prove its own case).

A. <u>BVT Does Not Owe A Fiduciary Duty to Plaintiffs</u>

1. The Disclaimer expressly provides no joint venture was created among the parties and it is fully enforceable.

Plaintiffs allege the Agreement created a joint venture among BVT and Plaintiffs, imposing fiduciary duties on BVT. (FAC ¶ 144.) This allegation is contradicted by the Disclaimer, which is fully binding and enforceable, and Plaintiffs have no contrary evidence.

The Agreement states, in two separate places: "Nothing herein contained shall constitute a partnership between, or joint venture of, the parties hereto or constitute either party the agent of the other." (UMF 30.) This Court previously held that "[t]he BVT Agreement clearly disclaims the creation of a joint venture in two separate provisions" and that there is "no fiduciary relationship between Plaintiffs and BVT, as a matter of law." (Ruling on Defendants' Demurrers to the Third Amended Complaint ("Demurrer Ruling") (attached as Ex. 57 to the Declaration of Christopher A. Elliott.)). The Court found that the Disclaimer "[is] not subject to two reasonable interpretations," but rather, "[b]oth provisions are unambiguous and clear of the parties' intent to not create a partnership or joint venture."[7] (*Id.*) Indeed, "given the explicit, unequivocal and clear language," the Court found Plaintiffs' allegation of a joint venture "extremely troubling." (*Id.*)

[7] *See 580 Folsom Assocs. v. Prometheus Dev. Co.*, 223 Cal. App. 3d 1, 16 (1990) (whether a joint venture exists depends on the intention of the parties.).

Nevertheless, the Court permitted Plaintiffs to amend their Complaint one final time to allege the Disclaimer is unconscionable. Plaintiffs did so amend, and added that allegation in their Fourth Amended Complaint but without any evidence forthcoming. To find a contract unconscionable, both procedural and substantive unconscionability must exist—"the former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one-sided results." *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109, 1133 (2013).

These aspects are analyzed on a sliding scale. The less evidence of procedural unconscionability there is, the more "substantively oppressive" the contract terms must be to support a finding of unconscionability. *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83, 114 (2000). "[T]he core concern of the unconscionability doctrine is the absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109, 1145 (2013) (quote marks omitted). Here, Plaintiffs had a meaningful choice. They extensively negotiated the Agreement, voluntarily chose to sign it, and its terms do not unreasonably favor BVT. Thus, there is no procedural or substantive unconscionability.

2. The Disclaimer is not procedurally unconscionable.

In analyzing whether an agreement is procedurally unconscionable, the court "focuses on two factors: 'oppression' and 'surprise.'" *A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 486 (1982). Oppression may be found when there is "an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice." *Id.* Surprise exists when "the supposedly agreed-upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms." *Id.* Generally, a contract is more likely to be found procedurally unconscionable when there is "a contract of adhesion, 'which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.'" *Walnut Producers of California v. Diamond Foods, Inc.*, 187 Cal. App. 4th 634, 645 (2010), quoting *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 160 (2005).

Here, Plaintiffs cannot establish the Disclaimer is procedurally unconscionable. The Agreement plainly was not a contract of adhesion or a form contract. (UMF 4-17.) It was extensively negotiated, and BVT made many substantive and meaningful concessions that favored Plaintiffs. (UMF 4, 11-14.) (Indeed, the reduction in distribution fees and merchandising royalty resulted in millions more being paid to Plaintiffs. (UMF 14.)) Each of the Plaintiffs were represented by counsel, a William Morris agent worked on their behalf, and Plaintiffs themselves all had significant experience in the field of television. (UMF 6-9.) The contract went through multiple drafts, which Plaintiffs had sufficient time to review. (UMF 11, 15-16.) Nothing supports a finding of "oppression." *See Los Angeles Unified Sch. Dist. v. Casasola*, 187 Cal. App. 4th 189, 212 (2010) (no oppression where the parties were represented by counsel and "had the ability to negotiate a mutually satisfactory resolution to their business realities"); *Lanigan v. City of Los Angeles*, 199 Cal. App. 4th 1020, 1035-36 (2011) (no procedural unconscionability where "[party]'s attorney had the opportunity to negotiate the contract and its terms").

Further, according to Plaintiffs, Plaintiffs had options other than BVT to fund the Series and distribute it. (UMF 35.) They could have accepted one of those offers, sought others, or otherwise arranged for production and distribution. When a party has "meaningful choices," as Plaintiffs did here, "[t]here can be no oppression establishing procedural unconscionability, even assuming unequal bargaining power and an adhesion contract … " (which there was not here). *Wayne v. Staples, Inc.*, 135 Cal. App. 4th 466, 482 (2006).

Plaintiffs allege the Disclaimer was presented to them on a take it or leave it basis. (FAC ¶ 145.) There is no evidence to support that allegation; indeed, according to Plaintiffs, it could not have been an issue because they never asked for changes to the provision. (UMF ¶ 32.) Even if it had been made an issue, it would not be procedurally unconscionable, because the rest of the contract was heavily negotiated. Moreover, Plaintiffs cannot show any evidence of surprise. The Disclaimer was not hidden in the Agreement. It was printed in the same font as the rest of the Agreement, and appeared clearly right above where Plaintiffs were to sign (and appeared yet again in the attached Standard Terms and Conditions).

Under these conditions, courts have found "no element of surprise," and no procedural unconscionability. *O'Donoghue v. Sup. Ct.*, 219 Cal. App. 4th 245, 259 (2013), quoting *Greenbriar Homes Communities, Inc. v. Sup. Ct.*, 117 Cal. App. 4th 337, 345 (2004)) ("[T]he judicial reference provision … was 'written clearly in the same sized font as the rest of the agreement, and is easily understood. The provision was not buried in the agreement, but in fact appeared at a location where the purchaser was almost certain to see it—immediately above where the purchaser would sign the agreement.'").

Far from showing procedural unconscionability, these undisputed facts show negotiation of a contract by sophisticated parties represented by counsel. As in any negotiation, the parties eventually reached a bottom line, and Plaintiffs made the business decision to sign based on the terms negotiated. (UMF 33.) Because Plaintiffs cannot show oppression or surprise, their claim that the Disclaimer is procedurally unconscionable fails as a matter of law.

3. The Disclaimer is not substantively unconscionable.

Plaintiffs cannot show the Disclaimer is substantively unconscionable, either. In analyzing substantive unconscionability, the focus is on fairness of the contract's terms and "whether they are overly harsh or one-sided." *Pinnacle Museum Tower Assn. v. Pinnacle Mkt. Dev. (US), LLC*, 55 Cal. 4th 223, 246 (2012). However, "[a] contract term is not substantively unconscionable when it merely gives one side a greater benefit; rather, the term must be so one-sided as to 'shock the conscience.'" *Id.* Plaintiffs cannot meet their burden to show application of the Disclaimer would shock the conscience, because enforcement of the Disclaimer merely follows the parties' expressed intent not to form a joint venture.

The freedom to contract is a fundamental public policy. *See Carma Developers (Cal.) Inc*. v. *Marathon Dev. California, Inc.* 2 Cal. 4th 342, 363 (1992), quoting *In re Garcelon*, 104 Cal. 570, 591 (1894) (public policy requires "'that men of full age and competent understanding shall have the utmost liberty of contract, and that their contracts when entered into freely and voluntarily shall be held sacred, and shall be enforced by courts of justice'"). The parties were free

to contract to form the business relationship of their choosing, and they chose not to form a joint venture.

Further, the Disclaimer is not one-sided: it applies equally to all parties. Plaintiffs allege the Disclaimer is substantively unconscionable because purportedly only BVT benefits from the Disclaimer as only BVT had accounting responsibilities. (FAC ¶ 146.) This is not true under the express language of the Agreement shows otherwise. Plaintiffs produced the Series in accordance with the agreed-upon Production Budget that BVT funded, and the Agreement expressly granted BVT the right to audit the production books and records. (UMF 18, 29.) Moreover, Plaintiffs could have benefitted from the Disclaimer if the Series did not end up being profitable and instead incurred losses, because it would have barred BVT from arguing the relationship established a joint venture obligating Plaintiffs to share in the losses.[8] (That Plaintiffs do not share in losses is a separate reason why the relationship did not constitute a joint venture, as addressed in section 3 below.)

Further, while the Disclaimer makes clear the parties do not owe each other fiduciary duties, it does not preclude Plaintiffs from seeking recourse if Net Profits are not paid to them. BVT is still obligated to pay Net Profits to Plaintiffs according to the contract, and Plaintiffs still have the right to receive Statements and nay conduct an audit. Application of the Disclaimer her does not shock the conscience given that Plaintiffs can still recover for any amounts BVT allegedly owes them. *See O'Donoghue*, 219 Cal. App. 4th at 260 (provision that "does 'not limit the amount or type of relief [defendants can] obtain'" was not unconscionable).

4. Even if there were no Disclaimer, the Agreement did not create a joint venture as a matter of law.

Even if it had not contained the Disclaimer, the Agreement is still not reasonably susceptible of an interpretation that it created a joint venture. To establish the existence of a joint

[8] Of course, contract provisions that apply equally to both sides cannot be "unfairly one-sided." *See Malone v. Superior Court*, 226 Cal. App. 4th 1551, 1564 (2014) ("[I]t is clear that the delegation clause is not one sided, and it is therefore not substantively unconscionable due to a lack of bilaterality."); *O'Donoghue*, 219 Cal. App. 4th at 260-261 (Judicial reference provision was not substantively unconscionable because "Defendants '*did* get something in addition for their jury waiver—[plaintiff's] matching waiver.'" (Emphasis in original))

venture, there must be: "(1) joint interest in a common business; (2) with an understanding to share profits and losses; and (3) a right to joint control," *580 Folsom Assocs.*, 223 Cal. App. 3d 15-16, none of which are present here.

First, the Agreement shows no joint interest. Rather, it shows that Plaintiffs created the Series and produced it subject to BVT's control, and then sold it to BVT for distribution. The fact that both parties have an interest in the success of the Series is not sufficient to show a joint venture. *Oakland Raiders v. National Football League,* 131 Cal. App. 4th 621, 638 (2005) (no joint venture even if both parties share revenues).

Second, Plaintiffs' interest in the profits of the series are limited to contractually-defined "Net Profits." (UMF 21.) One party's receipt of a share of profits does not establish a joint venture. *See id.*; *Wiltsee v. Cal. Emp. Com.*, 69 Cal. App. 2d 120, 128 (1945).

Further, nothing in the Agreement provides for Plaintiffs to share in losses. The Agreement provides that production costs would be reimbursed by BVT and Plaintiffs would be paid a fee for their services. (UMF 18-19.) If the Series was unprofitable because it could not be sold for more than what it cost to produce, those losses were born only by BVT. (UMF 39.) Plaintiffs admitted they did not pay any of the Series' production costs. (UMF 38.) Thus, "the contract plainly allow[s] an opportunity for nonmutual profit that is absent in fiduciary relationships." *Wolf v. Sup. Ct.*, 107 Cal. App. 4th 25, 33 (2003).

Third, BVT had the exclusive right to distribute and commercially exploit the series, as well as the discretion to decide not to distribute or exploit the series at all.[9] (UMF 24-25.) Further, the Agreement gives BVT approval as to principal creative elements and the subject matter of each Series episode and "sole control" over publicity for the series. (UMF 26-27) The Agreement gave BVT final approval over numerous creative elements, not shared control. (UMF 26.) Nothing in the Agreement provides for "joint control" of any part of the business.

[9] Two factors were critical to the Court's finding in *Wolf* that the parties did not enter into a joint venture – that Disney had discretion to decide whether or not to exploit the rights as Disney sought fit, and was under no obligation to maximize profits. 107 Cal. App. 4th at 32-33. Both factors are present here.

B. Nye's Fraudulent Inducement Claim Fails As a Matter of Law

Nye's Fraudulent Inducement/False Promise cause of action alleges that "[u]pon receiving Nye's request for an accounting of BVT and WDC's books and records"—which Nye sent on January 8, 2014—"BVT and WDC induced him to spend time, money and other resources on an audit, under the false promise that BVT and WDC would provide Nye with access to the records and documentation necessary to conduct such an audit." (FAC ¶ 24.) This claim fails as a matter of law because Nye has no evidence that: (1) BVT, TWDC, or any of their agents made an actionable promise to Nye relating to the audit; (2) Nye relied on that promise in deciding to audit; and, (3) BVT or TWDC failed to do anything they promised to do.

1. Nye has not identified any specific promise on which he relied in auditing BVT.

Despite multiple requests to do so, Nye has never identified any specific statement or statements on which he relied in choosing to audit BVT. In response to BVT's interrogatory requesting that he identify such statements, and again in his supplemental response to the same interrogatory, Nye gave an evasive response that pointed to nearly all documents that had been produced to date in the action—more than 9,600 pages—without identifying where in those documents are the statements that are the basis for his claim.[10] (UMF 57-58.) At deposition, Nye was asked what statements induced him to audit. Again, Nye was unable to identify any particular statements, when they were made, or who purportedly made them. (UMF 59.) Nye's inability or unwillingness to identify any specific statements on which his fraudulent inducement claim is based is reason enough to grant summary adjudication of this claim in favor of both BVT and TWDC.

Critically, "[a] plaintiff's response to a comprehensive interrogatory question must fully disclose the information known at the time of the discovery request." *Id.* Nye's claim for false promise cannot survive summary adjudication if he cannot identify a promise on which the claim is based. *Beckwith v. Dahl*, 205 Cal. App. 4th 1039, 1060 (2012) ("[I]n a promissory fraud action .

[10] BVT has filed a motion to compel a further response to this Interrogatory, which was pending before the Discovery Referee as of the date this motion was filed.

. . the complaint must allege (1) the defendant made a representation of intent to perform some future action, i.e., the defendant made a promise. . .”). Here, that requisite promise is missing.

In response to Defendants’ demurrers on this claim, Nye argued the claim was based on Braverman’s statements in his response letters to Salter. His own allegations show this is not true. Nye alleges he was induced to audit based on statements made after he requested an audit on Jan 8, 2014. (FAC ¶124, UMF 54.) Thus, Braverman’s statements could not be the reason why Nye decided to audit. Further, Nye admitted at deposition that he is not aware of any statements made by anyone at Disney—Braverman included—that he had to conduct an audit. He also testified this claim is based on (unidentified) statements purportedly made by the participations department during the audit. (UMF 60.) Braverman’s letters have nothing to do with this claim.[11]

Further, even if Nye had identified specific statements made after he requested his audit to support this claim, his claim still fails as to TWDC. Nye’s auditor’s communications during the audit were with the participations department, acting on behalf of BVT. (UMF 60.) TWDC did not owe any audit obligations to Nye because it was not a party to the Agreement. (UMF 17.) The undisputed facts show that TWDC is not legally responsible for any of these statements as a matter of law. *Inst. of Veterinary Pathology, Inc. v. California Health Labs., Inc.*, 116 Cal. App. 3d 111, 119 (1981) (“A parent corporation is not liable for the torts of its subsidiaries simply because of stock ownership.”)

2. Nye has no evidence to support that he relied on any statements made by BVT in deciding to audit.

Nye also has no evidence that he relied on any allegedly false statements in deciding to audit. Moreover, because the statements were allegedly made after Nye requested an audit, he could not have relied on them in deciding to audit in the first instance.

[11] Further, on their face, Braverman’s letters do not contain any statements that would support Nye’s claim; rather, they merely point out Nye’s contractual audit rights and offer to consider some review of information short of an actual audit. Besides, Braverman’s letters were made in response to Nye’s assertion of a legal claim, so they are protected by the litigation privilege. *Aronson v. Kinsella*, 58 Cal. App. 4th 254, 266 (1997) (“[I]f the statement is made with a good faith belief in a legally viable claim and in serious contemplation of litigation, then the statement is sufficiently connected to litigation and will be protected by the litigation privilege.”).

BVT asked for the facts that supported Nye's contention that any of BVT's statements caused him to audit, but Nye's only response was that he incurred auditor and attorney's fees, not how those fees were caused by his reliance on any statements by BVT. (UMF 62.) Further, Nye has admitted that his reason for auditing was because he believed Defendants were being "obstructionist," not because Defendants told him to audit and they would provide information. (Nye Depo. 308:18-309:6.) Absent more, Nye cannot prove this element of his claim. Pursuant to *Lazar v. Superior Court*, 12 Cal. 4th 631, 638-39 (1996), justifiable reliance is a required element for promissory fraud. That element is entirely missing here.

3. Nye cannot show that BVT failed to do anything it promised to do.

Finally, Nye has not presented evidence that BVT failed to do anything it purportedly promised to do. Again, Nye was asked in interrogatories to identify the false statements on which he bases this claim. In his responses, he refused to do so, once again pointing to the entirety of the documents produced in the action to date for this information. (UMF 57.) These evasive discovery responses are evidence of Nye's inability to produce evidence in support of this claim, and shift the burden to Plaintiffs. *Andrews v. Foster Wheeler LLC*, 138 Cal. App. 4th 96, 107 (2006) ("If plaintiffs respond to comprehensive interrogatories seeking all known facts with boilerplate answers that restate their allegations, or simply provide laundry lists of people and/or documents, the burden of production will almost certainly be shifted to them. . .").

C. <u>Plaintiffs Adduced No Evidence That BVT Fraudulently Misrepresented Or Concealed Facts</u>

Discovery has been ongoing for over a year. Documents have been produced, written discovery conducted, and Plaintiffs deposed. Notwithstanding all that, Plaintiffs have failed to adduce any evidence to support their Fraudulent Misrepresentation and Fraudulent Concealment causes of action alleged against BVT. Plaintiff's allegations that BVT breached the Agreement by misreporting information about the financial performance of the Series is not enough to constitute fraud. The five elements of fraud are: "(a) a misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity; (c) an intent to defraud, i.e., to induce reliance; (d)

justifiable reliance; and (e) resulting damage." *Lazar*, 12 Cal. 4th at 638. To maintain a fraud action, a plaintiff must show that he or she changed position in reliance based on the fraudulent representation, and was damaged by that change of position. Cal. Civ. Code, § 1709. Here, Plaintiffs have no evidence that Defendants knowingly made any misrepresentations or concealed facts on the Statements, with the intent that Plaintiffs rely on those Statements, and that Plaintiffs did in fact rely on the Statements to their detriment.

Plaintiffs have not identified any misrepresentations or concealed facts in the Statements. As with Nye's fraudulent inducement claim, BVT requested that Plaintiffs identify the misrepresentations on which these causes of action are based, the individuals who made the representations, and how such representations were false. Plaintiffs again responded by identifying more than 9,600 pages of documents produced in this action, but did not identify any particular document or specific misrepresentations in such documents. (UMF 68-69.) Moreover, none of the Plaintiffs could point to specific misrepresentations during deposition. (UMF 70.)

As to purportedly concealed information, Plaintiffs offered similarly evasive responses. (UMF 65.) They generically responded that profits were "withheld" and "intentionally improper accounting techniques" were concealed. But, they did not identify the specific information as to what profits had been withheld (such as the specific lines of revenue, or the misapplied expenses or costs). Nor did they identify the purportedly concealed improper accounting techniques. (UMF 65, 67.)[12]

Second, assuming for argument only, there were any misrepresentations or concealed facts on the Statements (there were not), Plaintiffs have no evidence that BVT knew the representations were false or that facts were concealed when the Statements were issued. Knowledge of falsity on

[12] Plaintiffs have now had over a year to conduct discovery. They have a duty to provide discovery responses that identify the precise nature of their claims so that BVT can defend against them. Plaintiffs cannot survive summary judgment simply by alleging that information is in BVT's possession**.** *See Eisenberg v. Alameda Newspapers, Inc.*, 74 Cal. App. 4th 1359, 1375-76 (1999) ("[W]here the parties have had sufficient opportunity adequately to develop their factual cases through discovery …, in order to avert summary judgment the plaintiff must produce *substantial* responsive evidence sufficient to establish the existence of a triable issue of material fact on the issues raised by the plaintiff's causes of action.").

defendant's part is a necessary element of the cause of action. *Lazar* at 638 ("knowledge of falsity" is one of the elements of fraud which gives rise to the tort action for deceit). Plaintiffs' interrogatory responses were devoid of any facts to support that BVT knew information on the Statements was false when they were issued. (UMF 66.)

Third, Plaintiffs have no evidence that BVT intended to deceive them. *Id.* Indeed, when asked to state all facts that support their contention that BVT made any misrepresentations "in a deliberate effort to induce" Plaintiffs to accept lower payments, Plaintiffs' initial response was remarkably lacking in facts: "The statement speaks for itself. In fact, this Interrogatory is entirely incomprehensible because the answer is contained in the question posed." (UMF 66.) Plaintiffs subsequently supplemented this response, by generically stating there had been a "concerted, multi-decade scheme" (without identifying what that scheme was), and that "[t]he circumstantial evidence supporting this position is overwhelming," without identifying the purported circumstantial evidence. (UMF 66.) None of the Plaintiffs could identify any evidence of fraudulent intent. (UMF 71.)

Moreover, Ablesoft and KCTS, expressly admitted they had no reason to believe any misstatements were intentional. (UMF 71.) Plaintiffs cannot convert a breach of contract claim to a fraud claim without evidence that a fact-finder could rely on to find fraudulent intent by a preponderance of the evidence. "[S]omething more than nonperformance is required to prove the defendant's intent not to perform his promise." *Tenzer v. Superscope, Inc.*, 39 Cal. 3d 18, 31 (1985) ("[I]f plaintiff adduces no further evidence of fraudulent intent than proof of nonperformance of an oral promise, he will never reach a jury."); *see also Erlich v. Menezes*, 21 Cal. 4th 543, 551 (1999) ("[C]onduct amounting to a breach of contract becomes tortious only when it also violates a duty independent of the contract arising from principles of tort law.").

D. <u>Plaintiffs' Punitive Damages Claim Fails as a Matter of Law</u>

Plaintiffs have similarly failed to adduce evidence to support their claim for punitive damages. Plaintiffs must establish by clear and convincing evidence that Defendants acted with malice, oppression or fraud to support any claim for punitive damages. *Basich v. Allstate Ins. Co.*,

87 Cal. App. 4th 1112, 1121 (2001). Where a plaintiff has no evidence to support a finding of punitive damages, summary adjudication of the claim is appropriate. Code Civ. Proc. § 437c(f)(1) (authorizing summary adjudication of "a claim for damages, as specified in Section 3294 of the Civil Code").

Moreover, when punitive damages are sought against a corporation, as here, Plaintiffs must show that an officer, director, or managing agent of the corporation "had advance knowledge of the unfitness of the employee [that committed the acts on which punitive damages are based] and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded." Civ. Code § 3294(b). "The managing agent must be someone who exercises substantial discretionary authority over decisions that ultimately determine corporate policy." *White v. Ultramar, Inc.*, 21 Cal. 4th 563, 573 (1999).

Here, Plaintiffs' generic discovery response as to the facts supporting their claim for punitive damages asserted that Defendants purportedly committed fraud, but did not identify any facts as to what that fraudulent conduct was to support the claim. (UMF 72.) Plaintiffs did not identify any employee of Defendants who purportedly committed fraud, nor did they identify any officer, director, or managing agent of Defendants who committed the acts or authorized or ratified the conduct of any of their employees in committing the allegedly fraudulent acts. (*Id.*)

E. <u>Ablesoft Does Not Have Standing to Sue</u>

Ablesoft does not have standing to sue. It is not a party to the BVT Agreement. (UMF 73.) Although it alleges that it is the successor-in-interest to Rabbit Ears, which was a party, it cannot produce any evidence showing it acquired or succeeded to Rabbit Ear's rights under the Agreement. (UMF 74-78.) Therefore, it has no standing to assert any claims arising out of the Agreement. *See Hatchwell v. Blue Shield of California*, 198 Cal. App. 3d 1027, 1034 (1988) ("Someone who is not a party to the contract has no standing to enforce the contract or to recover extra-contract damages for wrongful withholding of benefits to the contracting party."); *The MEGA Life & Health Ins. Co. v. Sup. Ct.*, 172 Cal. App. 4th 1522, 1530-32 (2009) (person who is not party to a contract cannot assert tort claims, including fraud, arising out of that contract).

BVT requested that Ablesoft produce all documents relating to its allegation that it is the successor-in-interest to Rabbit Ears. (UMF 74.) In response, Ablesoft did not produce a single legal document showing any transfer of rights from Rabbit Ears to Ablesoft. Instead, it produced: (1) a printout of a press release from 1997 that said that a company called Microleague Multimedia Inc. ("Microleague") was announcing it had acquired Rabbit Ear's assets from another company called MMG Holdings Inc. ("MMG"); and (2) a printout of a Form 8-K from Microleague that attaches as an exhibit an unsigned asset acquisition agreement between Microleague and MMG. (*Id.*) Ablesoft did not produce a document evidencing a transfer of assets from Rabbit Ears to MMG or from Microleague to Ablesoft. (UMF 75.)

BVT took the deposition of Ablesoft's Person Most Qualified on the topic of the factual and legal basis for Ablesoft's ability to sue on behalf of Rabbit Ears. (UMF 76.) Ablesoft's owner, John Herson, admitted that he has no personal knowledge of how Ablesoft purportedly obtained rights from Rabbit Ears, that Ablesoft has no knowledge of what MMG is or how it purportedly obtained assets from Rabbit Ears, that Ablesoft has no documents showing that purported transfer, and Ablesoft does not know if the agreements between Microleague and MMG were ever executed. (UMF 77.) Herson testified that he "understood" that Microleague became Ablesoft through bankruptcy, but has no personal knowledge of how Rabbit Ears assets transferred to Microleague or any documents showing that transfer. (UMF 78.)

It is Ablesoft's burden to produce evidence showing it is the successor-in-interest to Rabbit Ears. *Mendoza v. JPMorgan Chase Bank, N.A.*, 6 Cal. App. 5th 802, 810 (2016) ("Standing is a threshold issue necessary to maintain a cause of action, and the burden to allege and establish standing lies with the plaintiff."). Ablesoft has not done so and admitted that it has no ability to do so. There has been no admissible evidence presented that Ablesoft has any rights under the Agreement. Thus, all of Ablesoft's claims should be summarily adjudicated against it.

IV. CONCLUSION

For the foregoing reasons, BVT respectfully requests that the Court grant its motion for summary adjudication in its entirety.

DATED: May 24, 2019

Respectfully submitted,

MITCHELL SILBERBERG & KNUPP LLP
LUCIA E. COYOCA
CHRISTOPHER A. ELLIOTT

By: /s/ Lucia E. Coyoca
Lucia E. Coyoca
Attorneys for The Walt Disney Company and Buena Vista Television, LLC

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California, I am over the age of eighteen years and am not a party to this action; my business address is Mitchell Silberberg & Knupp LLP, 2049 Century Park East Los Angeles, CA 90067.

On May 24, 2019, I served a copy of the foregoing document(s) described as **DEFENDANTS' NOTICE OF MOTION AND MOTION FOR SUMMARY ADJUDICATION RE BREACH OF FIDUCIARY DUTY AND FRAUD CAUSES OF ACTION, PUNITIVE DAMAGES CLAIM, AND ABLESOFT STANDING** on the interested parties in this action at their last known address as set forth below by taking the action described below:

Martin J. Barab, Esq. A. Raymond Hamrick, III, Esq. Charles C. Rainey, Esq. **Hamrick & Evans, LLP** 2600 West Olive Ave. Suite 1020 Burbank, CA 91505	***Attorneys for Plaintiff, William S. Nye, James McKenna, Erren Gottlieb, Ablesoft, Inc. f/k/a Rabbit Ears Productions, Inc., and Cascade Public Media d/b/a KCTS-TV***

☑ **BY PERSONAL DELIVERY**: I placed the above-mentioned document(s) in sealed envelope(s), and caused personal delivery by Nationwide Legal of the document(s) listed above to the person(s) at the address(es) set forth above.

I declare under penalty of perjury under the laws of the United States that the above is true and correct.

Executed on May 24, 2019, at Los Angeles, California.

Kelsie Jones

Kelsie Jones

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18, and not a party to the within action; my business address is NATIONWIDE LEGAL LLC 1609 James M Wood Blvd, Los Angeles, CA 90015.

On May 24, 2019, I served the foregoing document(s) described as **DEFENDANTS' NOTICE OF MOTION AND MOTION FOR SUMMARY ADJUDICATION RE BREACH OF FIDUCIARY DUTY AND FRAUD CAUSES OF ACTION, PUNITIVE DAMAGES CLAIM, AND ABLESOFT STANDING** which was enclosed in sealed envelopes addressed as follows, and taking the action described below:

Martin J. Barab, Esq.
A. Raymond Hamrick, III, Esq.
Charles C. Rainey, Esq.
Hamrick & Evans, LLP
2600 West Olive Ave.
Suite 1020
Burbank, CA 91505

Attorneys for Plaintiff, William S. Nye, James McKenna, Erren Gottlieb, Ablesoft, Inc. f/k/a Rabbit Ears Productions, Inc., and Cascade Public Media d/b/a KCTS-TV

☒ **BY PERSONAL SERVICE:** I hand delivered such envelope(s):

☐ to the addressee(s);

☐ to the receptionist/clerk/secretary in the office(s) of the addressee(s).

☐ by leaving the envelope in a conspicuous place at the office of the addressee(s) between the hours of 9:00 a.m. and 5:00 p.m.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on May 24, 2019, at Los Angeles, California.

Printed Name _____ Signature _____

Make a Reservation

WILLIAM S NYE VS WALT DISNEY COMPANY ET AL

Case Number: BC673736 Case Type: Civil Unlimited Category: Contractual Fraud
Date Filed: 2017-08-24 Location: Stanley Mosk Courthouse - Department 20

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Case Name: WILLIAM S NYE VS WALT DISNEY COMPANY ET AL	Case Number: BC673736
Type: Motion for Summary Judgment	Status: RESERVED
Filing Party: Buena Vista Television , LLC (Defendant)	Location: Stanley Mosk Courthouse - Department 20
Date/Time: 08/07/2019 8:30 AM	Number of Motions: 1
Reservation ID: 490533770616	Confirmation Code: CR-BQUA2RIFRM42ZY5J6

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Description	Fee	Qty	Amount
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